



COMDTINST M16200.5A

AUG 5 1993

COMMANDANT INSTRUCTION M16200.5A

Subj: CIVIL PENALTY HEARING OFFICER PROCEDURES

Ref: (a) 33 CFR 1.07, Enforcement; Civil and Criminal Penalty Proceedings

1. PURPOSE. This instruction provides guidance for Civil Penalty Hearing Officers in carrying out their responsibilities in adjudicating civil penalties.
2. ACTION. Coast Guard Civil Penalty Hearing Officers shall be governed by the procedures detailed in this instruction. Hearing Officers shall remain mindful of Congressional intent where civil penalties are authorized, and shall ensure that their actions are consistent with national goals and Coast Guard policy. The Chief Counsel shall ensure compliance with the provisions of this instruction.
3. DIRECTIVES AFFECTED. Hearing Officer Guide, COMDTINST M16200.5, is cancelled.
4. BACKGROUND.
  - a. Early Practices. In the early 1970s, organization of the Coast Guard civil penalty assessment system varied on a district-by-district basis. In many instances a district program division chief or branch chief decided penalty cases. In others, the field commander was the responsible decision maker. This direct involvement in the penalty process by the same structure that was responsible for detecting, investigating, and reporting

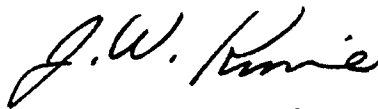
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apparent violations was problematic, particularly if there was any indication of command influence in case decisions. The same period was marked by increasing Congressional use of civil penalty authority to enforce the laws.

- b. Rule Changes. In 1978, new procedural rules were issued at 33 CFR 1.07, which established a structured process for deciding civil penalty cases. The rules ensured administrative due process while keeping the procedures simple for all concerned. The rules provided for designation of "Hearing Officers" who are removed from any other role in Coast Guard regulatory or enforcement activities and are solely responsible for the decisions in civil penalty cases. It was then determined that the formality associated with hearings before an Administrative Law Judge was not required. Congress continued to recognize the benefit of informal adjudicative proceedings in passage of the Oil Pollution Act of 1990, which expressly exempted the adjudication of class I civil penalties from the provisions of the Administrative Procedure Act. However, informality does not diminish the necessity for due process and basic fairness. 33 CFR 1.07 is intended to provide for due process. Hearing Officers must carry out their duties in a manner to fulfill these obligations.
- c. National Purpose. Hearing Officers must be mindful of the national goals articulated by Congress through enactment of statutes, such as the Oil Pollution Act of 1990, which provide for the assessment of civil penalties. Achievement of these purposes requires consistent national administration of civil penalty provisions in a legally sound manner. Hearing Officer actions must reflect Congressional purpose to ensure that our nation's resources are preserved, that the public remains mindful of its duties and responsibilities, and that our nation enjoys safe, environmentally sound, maritime transportation. In ensuring that assessments are based on all available information, taking into account the facts specific to each case, and are appropriately made so as to achieve the statutory purpose intended, Hearing Officers perform an important and essential role with respect to the furtherance of national goals.



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## TABLE OF CONTENTS

### Chapter 1. - THE CIVIL PENALTY HEARING OFFICER

A. Authority	1-1
B. Responsibilities	1-1
C. Independence from Program Functions	1-1
D. Independence from Chain of Command	1-1
E. Impartiality	1-2
F. Judicial Demeanor	1-2
G. Discretion	1-2
H. Consistency	1-2

### Chapter 2. - RELATIONSHIPS

A. Administrative Control - Area Commander	2-1
B. Operational Control - Chief Counsel	2-1
C. Relationship with District Program Manager	2-1

### Chapter 3. - CIVIL PENALTY CASE PROCESSING

A. Investigation And Reporting	3-1
B. Recommendations of the Program Manager	3-1
C. Communication	3-1
D. Timeliness	3-1
E. Civil Penalty Case Flow	3-1
F. Evidence	3-4
G. Findings	3-6
H. Elements of Violation	3-6
I. Prior Histories	3-6
J. Official Notice	3-6
K. Party Rights	3-6
L. Companion Cases	3-8
M. Party Requests	3-8
N. Special Situations	3-9
O. Case Records	3-9
P. Verbatim Transcripts	3-10

### Chapter 4. - THE HEARING

A. The In-Person Hearing	4-1
B. Alternative Procedures	4-4

### Chapter 5. - DECISIONS

A. General	5-1
B. Dismissals	5-1

### Chapter 6. - APPEALS

A. Action on Appeal	6-1
B. Action on Remanded Cases	6-1



## CHAPTER 1. THE CIVIL PENALTY HEARING OFFICER

- A. Authority. Coast Guard Hearing Officers are hereby delegated the authority to decide when a violation has occurred and to assess civil penalties. This delegation includes the authority to administer oaths and to issue subpoenas to the extent provided by law. In addition, Hearing Officers are empowered to conduct in-person hearings, provide appropriate warnings, mitigate penalties, and dismiss cases.
- B. Responsibilities. It is every Hearing Officer's responsibility to consider each violation case received; to make necessary case findings; to determine whether the alleged violations were, in fact, committed; to decide on a sanction if a violation has been committed and to conduct the proceedings in accordance with the requirements of due process. To properly carry out these responsibilities, Hearing Officers must understand their roles in relation to other Coast Guard functions. The Hearing Officer must be knowledgeable of the laws and regulations being enforced and must be thoroughly familiar with the civil penalty process.
- C. Independence From Program Functions. Hearing Officers shall not officially associate themselves with investigations or investigators in violation cases. Entering an electronic database to retrieve evidentiary information not included in the case file constitutes investigation and is prohibited. This prohibition is necessary because the Hearing Officer, as an impartial adjudicator, may consider only the evidence included in the physical case file and also because the party must be given a copy of all evidence being considered. Hearing Officers may only access an electronic database to record actions taken at the hearing office. The essential function of every Hearing Officer is decision making. This function cannot be delegated to a program manager or to a field unit.
- D. Independence From The Chain of Command. Each decision in a civil penalty case is made by the Hearing Officer alone, in the absence of command influence. This independence is an important aspect of the unique position that Coast Guard Civil Penalty Hearing Officers hold. Hearing Officers must understand this responsibility and approach each decision with a mind free from extraneous or irrelevant considerations. Other persons who are active in the civil penalty process should share this understanding and guide their actions so as not to suggest any improper influence on this responsibility.

- E. Impartiality. Hearing Officers cannot have any personal interest in the outcome of a case, except to ensure that the record is complete, that the party has been afforded full notice and an opportunity to be heard, and that the correct decision has been made. The Hearing Officer is an impartial decision maker who weighs evidence and determines whether the evidence is sufficient to show that a violation did occur and, if so, assesses an appropriate penalty or issues a letter of warning.
- F. Judicial Demeanor. The Hearing Officer is a unique Coast Guard representative to the public. Although a member of the Coast Guard, the Hearing Officer must establish the reality and appearance of impartiality and fairness. Customary military deference to field units' or district program managers' opinions is inappropriate in the adjudicative process. The Hearing Officer must not assume that because a report of violation has been submitted, there must have been a violation, nor are program recommendations, even those consistent with COMDTINST 16200.3 series, binding. Any such attitude would be an abdication of the Hearing Officer's responsibility. Further, the Hearing Officer must give due attention and respect to the party's submissions and must not, in any way, give the impression that the Hearing Officer has already decided the case before the party has completed his or her presentation. Parties should, at all times, be treated with courtesy.
- G. Discretion. Hearing Officers have considerable discretion in procedural matters, as well as in determining credibility of evidence and appropriate penalty amounts. A Hearing Officer has discretion to manage proceedings in any appropriate way as long as the party is accorded due process. The perceptions of the public and of the party should always be kept in mind. Discretion should be exercised so as to preserve the positive reputation of the Coast Guard and protect the integrity of the civil penalty process.
- H. Consistency. Senior Hearing Officers have a responsibility to promote the policy that, in cases with similar facts and circumstances in their geographic area of responsibility, there will be consistency of penalty assessment. This will provide added assurance to the public that cases are being handled fairly.

## CHAPTER 2. RELATIONSHIPS

- A. Administrative Control - Area Commander. The three consolidated hearing offices are established administratively as elements of their respective area staffs. The Area Commanders are responsible for administrative oversight as the reporting officer/reviewer for Officer Evaluation Reports; providing routine operating and travel funds; providing computer support; providing access to their legal officers for assistance in interpretation of the law; providing assistance in personnel administration matters; and all other matters not impacting on program control. The Area Commanders shall allow the hearing offices to remain self-contained, independent operations. Collateral duties, if assigned, should be limited in scope and not adversely affect the primary duty of Hearing Officers.
- B. Operational Control - Chief Counsel. The Chief Counsel exercises a broad span of management and control over the hearing officer program to ensure consistency in adjudications Coast Guard wide. This oversight role includes active participation in the selection of Hearing Officers; assessing staffing levels and resource requirements; reviewing statistical data for periodic analysis; identifying civil penalty case actions to be entered into any electronic case tracking system; providing guidance and direction on policy and procedures; evaluating the effectiveness of the penalty assessment program; ensuring consistency of civil penalty assessment nationwide, to the extent practicable; and all other program management matters. In addition, the Chief Counsel serves as a source of information on the current status of the law and interpretation of the law.
- C. Relationship with District Program Manager. The district program manager forwards violation cases to the Hearing Officer with specific recommendations on the party to be charged and the role of the party; the violation; any evidence on mitigation, aggravation, or the gravity of the offense; recommended penalty amount; and any other relevant evidence. The district program manager's assistance may be needed in securing Coast Guard witnesses. The Hearing Officer will provide feedback to the district program manager of action taken in each case to improve the general quality of cases being forwarded for civil penalty proceedings. The Hearing Officer may provide unit training on the civil penalty assessment process and function of the Hearing Officer. Where a specific case is concerned, the Hearing Officer may only discuss information which is a matter of record. Units may not communicate directly with the Hearing Officer; any communication with units must be through the district program manager.





### CHAPTER 3. CIVIL PENALTY CASE PROCESSING

- A. Investigation and Reporting. The Hearing Officer is prohibited from participating in the investigation of violation cases referred for the assessment of civil penalties. It is the district program manager's responsibility to review the information submitted and, in accordance with existing policy, to decide how to proceed. If the program manager decides to proceed with civil penalty action, it is the program manager's responsibility to mail two copies of the entire case file, including videotapes and/or photographs, in addition to forwarding the case electronically, to the Hearing Officer for consideration.
- B. Recommendations of the Program Manager. The district program manager is required to include disposition recommendations with a violation case forwarded for initial review. The district program manager's recommended penalty will reflect Coast Guard operating program policy. It is important to note that a program manager does not have the benefit of complete information in formulating a recommendation, particularly information on the party's behalf. Moreover, a program manager, while conducting an objective evaluation of violation cases for sufficiency and evidentiary content, is not independent or impartial, but an advocate. The sole responsibility for the decision in a penalty case lies with the Hearing Officer. Thus, any recommendation is simply another factor to be considered in arriving at a penalty decision.
- C. Communication. Hearing Officers shall not communicate with anyone regarding a specific case unless it is in writing and entered into the case file. The substance of all oral communication between the party and the hearing office staff must be recorded in a memorandum, which shall be dated, signed, and entered into the case file.
- D. Timeliness. Timely resolution of the enforcement action after detection of a violation promotes maritime safety and environmental protection by providing incentive for responsible parties to take action to prevent recurrence. Timeliness is an important element of due process which is necessary in these proceedings. Appendix A is a suggested timeline for the processing of civil penalty cases by the Hearing Officer. However, the timeline is for internal management purposes. It does not create any due process rights nor is it a basis for dismissal of any case.
- E. Civil Penalty Case Flow. The following steps are performed in processing civil penalty cases. It is important to remember that while a district program manager may refer to

various types of violation cases as being "civil penalty cases", a violation case becomes a civil penalty case when a Civil Penalty Hearing Officer has reviewed it and determined there is a basis for civil penalty proceedings.

1. After receipt, the assigned Hearing Officer reviews the violation case, particularly with respect to:
  - a. evidence to support each element of an alleged violation;
  - b. applicability of cited statutes and regulations to party, place and offense;
  - c. evidence that the party and its role, e.g., owner, operator, etc., have been correctly identified;
  - d. other considerations (whether a civil penalty is authorized and appropriate, the maximum authorized penalty, extenuating or mitigating circumstances, gravity of the offense, policy, etc.).
2. After completing initial review, the assigned Hearing Officer either finds there is a basis for civil penalty proceedings and an appropriate preliminary penalty amount determined, or the violation case is returned to the district program manager for further investigation or preparation, or other action.
3. A letter of notification (LON) is prepared, signed by the assigned Hearing Officer, and sent to the party designated by the district program manager, or to the party's legal representative, if indicated in the case file. In cases in which Letters of Undertaking (LOU) have been tendered, the LON should be sent in care of the attorney or other representative designated in the LOU for service. This designation should be clearly indicated in the case file.
  - a. LONs should be sent via certified mail, return receipt requested, within the United States, or registered mail, return receipt requested, outside the United States. The LON must provide the party with notice of the nature of the violation(s) alleged. A general description of the applicable regulations with enclosures of MSIS printouts or CG 4144 is not sufficient.
  - b. A complete copy of the case file will be sent with every letter of notification. The LON should indicate that the case file is enclosed. The party

must be given a chance to rebut all the evidence to be considered. If additional evidence, other than that provided by the party, is added to the file after the LON was sent, the party must be provided copies of this additional evidence. Simply put, the party has the right to know what information is in the record under consideration by the Hearing Officer.

4. Within 30 days of receipt of the LON, the party may request a hearing, provide any written evidence and arguments in lieu of a hearing, or pay the amount specified in the LON. The response will be considered timely if postmarked within 30 days of the date shown on the return receipt.
5. If the party fails to respond within 30 days, the right to a hearing is waived. However, at the discretion of the Hearing Officer, a hearing may be granted if the party submits a late request.
6. The Hearing Officer may provide an opportunity for the district program manager to rebut evidence submitted by the party, or to respond to specific inquiries. A copy of any rebuttal or response must be sent to the party.
7. If the Hearing Officer receives a response from a third party or non-party to the action, such as an individual who claims to be ultimately responsible for the penalty through a contract, the Hearing Officer may either proceed with the case or return the case to the program manager. The response may be used by the Hearing Officer if it is relevant and not inconsistent with the rights of the party. A Hearing Officer may not, on his own initiative, change the party.
8. Once all of the replies, inquiries, and requests have been addressed, and, when held, hearings conducted, the Hearing Officer reviews the complete record and makes necessary determinations in the case. The Hearing Officer must ensure that all actions, even administrative actions associated with case processing, are reflected in the record. The Hearing Officer may dismiss the case, issue a warning, or assess a monetary penalty. There may be a mix of these possible decisions for a case with multiple alleged violations. The party is notified of the Hearing Officer's decision by certified/registered letter, with a copy sent to the district program manager.

9. After receipt of the Hearing Officer's decision, the party may pay the penalty, petition to reopen the hearing, or file an appeal.
  - a. A petition to reopen the hearing may be filed at any time prior to final agency action. Justification for petitions to reopen is generally limited to the discovery of new evidence not previously available, e.g., location of a witness, lab analysis, etc. If a petition to reopen is granted, the party has an additional 30 days after receipt of the decision in which to respond.
  - b. The party may submit an appeal within 30 days of receipt of the decision. If a case has been reopened, the party still has the right to appeal within 30 days of receipt of the decision on the petition. The response will be considered timely if postmarked within 30 days of the date shown on the return receipt. Commandant (G-LMI) may affirm the decision, reverse the decision, modify the decision, or remand the case for further action.
10. If the party fails to respond within the prescribed time limit, the Hearing Officer's assessment becomes the final agency action. Determinations as to the timeliness of an appeal are made by Commandant (G-LMI). Therefore, all appeals, regardless of when received, must be forwarded to Commandant (G-LMI).

F. Evidence.

1. Types of Evidence.

- a. Documentary Evidence. When first submitted to a Hearing Officer for review, a violation case is usually made up of various documents. Included may be a completed report of violation form; completed check-off lists; notes of observations by inspecting or investigating personnel, whether made at the time of the observations or at a later date; written statements of witnesses, investigators, or inspectors; photographs, with photo data and other information written on the back or on accompanying sheets of paper; chemical analysis results (e.g., laboratory reports); charts/maps; diagrams, plans or drawings, blueprints; etc. MSIS narrative statements must be signed or contain other indication that the statement was signed, and could be verified if necessary. The sum of the evidentiary material must be sufficient to show a violation which creates

responsibility for a civil penalty, i.e., a prima facie case. A party in a case will often submit documentary materials. The forms of these written responses may vary widely from a simple letter to a comprehensive and sophisticated legal brief with lengthy discussion, arguments, motions, and attachments. When the authenticity of documentary evidence submitted by the Coast Guard or the party is in question, the Hearing Officer may require authentication.

- b. Oral Evidence. Oral evidence will often be offered by a party in a case; it is less likely to be offered by the Coast Guard. At an in-person hearing, a party will usually present oral testimony that is intended to demonstrate either that the violation did not occur, or that the circumstances excuse or mitigate the violation. This testimony can be accompanied by additional documentary evidence or by reference to such evidence already in the case record.
2. Standards of Evidence. For the purposes of this instruction, any decision to assess a penalty is based upon a decision by the Hearing Officer that the weight of the evidence supporting the violation alleged outweighs the weight of contrary evidence.
3. Reliability Of Evidence. In receiving evidence, the Hearing Officer is not bound by strict rules of evidence. In evaluating the evidence presented, the Hearing Officer must give due consideration to the reliability and relevance of each item of evidence.
4. Credibility. Where evidence is not reliable, its value is reduced or nullified. If evidence is reliable, and in accord with reason, it may support a finding even where there is evidence that contradicts it. The Hearing Officer has the discretion to determine the credibility of evidence. The decision to believe or disbelieve evidence should be made thoughtfully. The Hearing Officer is to determine whether evidence is credible, and state the basis of any determination, when at issue, in the record.
5. Conclusions. A statement concluding the existence of a violation is not evidence. Without a statement of what observations, facts and inferences led to the conclusion, such statements must be viewed as having limited reliability. If the conclusion is contradicted by other evidence or challenged by the party, the underlying observations or other assurances of reliability should be obtained.

- G. Findings. A finding of violation must be supported by the weight of the evidence for each element of the violation. Other findings, such as those pertaining to the penalty amount, must be similarly supported. For example, if the amount of the penalty for an oil spill is to be based on a very large quantity spilled, there must be evidence that a very large quantity of oil was in fact discharged into navigable waters.
- H. Elements Of Violation. Each element of a violation must be proved by the weight of the evidence, including:
1. elements which demonstrate that the statute or regulation at issue applies to the party, vessel, or facility, as the case may be; and
  2. specific elements which comprise the violation, as provided in the statute or regulation.
- I. Prior Histories. For penalty assessment purposes, Hearing Officers may consider the prior violation history of a party if it is included in the case file, and only if final agency action on the prior violation has occurred.
- J. Official Notice. The Hearing Officer may take notice of matters which are subject to a high degree of indisputability and are commonly known, or can be ascertained from readily available sources of known accuracy. Prior to taking such notice, the party must be given an opportunity to consent or object. When official notice is taken, it should be noted in the record along with the party's response. A similar opportunity to consent or object need not be given to the program manager.
- K. Party Rights. In addition to the notification rights discussed at paragraph 3.E.3., a party shall be accorded the following rights:
1. A party is to be provided an opportunity to review all materials in the case file and be provided copies of these items free of charge. After being given the copies, the party may expect to be provided with copies of any materials subsequently added to the file. This does not include material that would disclose or lead to the disclosure of the identity of a confidential informant. The party must be allowed to examine any physical evidence incapable of being placed in the case file.
  2. A party may request a hearing upon specifying in writing the issues in dispute. The request must be postmarked within 30 days after the party receives notice of the alleged violation or the right is waived. The Hearing

Officer may, at his or her discretion, grant a late request for a hearing.

- a. A party may request, at any time up to 10 days before the scheduled date of the hearing, that the issues in dispute be amended. Any such request submitted less than 10 days before a scheduled hearing may be approved at the discretion of the Hearing Officer.
  - b. A party may submit a written request to change the location of the hearing. The Hearing Officer has discretion to grant the request if justified. Mere convenience of the party is insufficient justification for changing the hearing location. The Hearing Officer's response shall be in writing.
3. A party may submit, or request additional time to submit, written evidence and arguments in lieu of a hearing within 30 days after receipt of notice of the initiation of action.
4. A party may respond to or rebut any material in the case file. The party may offer any facts, statements, explanations, documents, sworn or unsworn testimony, or other items to rebut the alleged violation or to be used by the Hearing Officer to determine an appropriate penalty, if warranted.
5. At their own expense, parties may be represented by counsel.
6. A party may present the testimony of any witness either through a personal appearance, if reasonably available, or by telephone or a written statement. The party may submit a written request for Hearing Officer assistance to obtain the personal appearance of a witness.
7. At their own expense, parties may have a verbatim transcript made of an in-person hearing.
8. After the evidence in the case has been presented, a party may request an opportunity to submit a written statement for consideration and for further review. In granting such a request, the Hearing Officer shall specify a time limit for submission of the statement.
9. A party may petition, in writing, to the Hearing Officer, at any time prior to final agency action, to reopen the hearing on the basis of newly discovered evidence.
10. A party may appeal the decision of the Hearing Officer. However, the appeal must be submitted to the Hearing Officer, postmarked within 30 days from the date of

receipt of the decision, or the decision will become final agency action. The Hearing Officer is not authorized to grant an extension of the 30 day period for the submission of an appeal. A party must be provided with a copy of the Commandant's decision on appeal. If the Commandant's action on appeal is to remand, mitigate, or suspend the decision of the Hearing Officer, the Commandant will inform the party of the action and any conditions of the action.

- L. Companion Cases. When there are companion cases based on the same factual incident before the same Hearing Officer, (e.g., negligent operation cases against operators of both vessels involved in a collision), it is very important not to use evidence from one case to support a decision in the other case. Such cases shall not be joined in a single proceeding without consent of all parties. Each case must be decided solely on the basis of its individual case file. If cases are joined in a hearing or in a single letter responding to multiple cases, all the evidence in any of the cases may be considered in extenuation or mitigation in any case so joined.
- M. Party Requests. Requests by the party, such as requests for witnesses, extensions of time, change of location of hearing, etc., should be duly considered. Any denial must be in writing and, except where self-explanatory, must be accompanied by a brief statement of the grounds for denial.
  - 1. Witnesses. When a witness is requested, the Hearing Officer considers whether the witness may materially aid in the decision on the case. If so, the Hearing Officer seeks to obtain the witness' appearance through the district program manager for any Coast Guard witness. Where the presence of the witness cannot be obtained, substitutes for in-person testimony may be made, such as affidavits, telephone testimony, or stipulations between the party and the program manager.
  - 2. Subpoenas. Hearing Officers do not have absolute authority to subpoena witnesses or evidence in civil penalty proceedings. However, certain statutes which provide for civil penalties also authorize subpoena powers. The Hearing Officer may consult with the office providing Coast Guard legal support for assistance in these matters. The absence of subpoena power is not a reason to reject out-of-hand a request for a witness.



N. Special Situations

1. In Rem Cases. For those violations which allow proceedings in rem, the owner should be advised that the Coast Guard may proceed against the vessel.
2. Multiplicity. Where two citations can be given for the same offense, two separate penalties should not be assessed unless there are distinct features supporting the conclusion that two offenses occurred. For example, violation of a navigation rule and negligent operation is a single offense unless there is negligence in some respect other than violation of the rule. In this example, the negligent operation charge should be dismissed. Some examples of multiplicity are:
  - a. Navigation Rules and Negligent Operation;
  - b. Navigation Rules 8 and 15;
  - c. Navigation Rules 15 and 16;
  - d. Negligent Operation causing wake damage and 33 CFR 164.11(p)(6);
  - e. 33 CFR 155.310(a)(3) and 156.120(o), where vessel did not close drains during oil transfer; either no means of closing or means not used, but not both.
0. Case Records. The case record should include everything that occurs in the case from the time the Hearing Officer received it until it has been closed. When applicable, a case record will include:
  1. Report of violation\*;
  2. Evidence\*;
  3. Program manager's recommendations and arguments\*;
  4. Notification letter with evidence of service\*;
  5. Notations concerning phone conversations, delays, arrangements for hearings, and other administrative details;
  6. Party's response;
  7. Memo to program manager inviting rebuttal or additional input;
  8. Additional evidence;

9. Record of hearing;
10. Decision and assessment letter with evidence of service\*;
11. Petition to reopen;
12. Decision on petition to reopen;
13. Appeal;
14. Memo inviting district commander's comments on appeal;
15. District commander's comments on appeal;
16. Letter forwarding file to Commandant on appeal;
17. Letter to party providing copy of district commander's comments on appeal;
18. Appeal decision.

Note: Items marked with an "\*" must be included in a case file for an uncontested penalty assessment.

- P. Verbatim Transcript. A verbatim transcript of a hearing will not normally be prepared. A party may, at his or her own expense, have a verbatim transcript made. If the party has had a verbatim transcript of the hearing made, the party must submit two copies of the transcript to the Hearing Officer not later than the time of filing the appeal. The Hearing Officer will include such a transcript with the record when forwarding the appeal. Electronic recording of the proceedings should not be allowed, except in conjunction with the preparation of a verbatim transcript by a certified court reporter.

## CHAPTER 4. THE HEARING

### A. The In-Person Hearing.

1. General. The hearing referred to in the rules at 33 CFR 1.07 is an in-person hearing, attended before the Hearing Officer by the party and/or the party's authorized representative.
2. Requests. Requests for hearings must be made in writing. There is room for discretion, and a Hearing Officer may permit the requesting and scheduling of hearings by telephone or in person. However, a consistent approach should be used. Requests should be promptly responded to in writing.
3. Scheduling. The Hearing Officer must promptly schedule all hearings which are requested. However, the requirement to promptly schedule a hearing does not detract from the Hearing Officer's discretion to hold the actual hearing at a later date.
4. Spontaneous Meetings With Parties. "Walk-ins" will occur. If one does, the Hearing Officer must weigh whether it would be of greater value to hear the case at that time or to schedule a hearing at a later time.
5. Location. Hearings will be held in an appropriate place that is of reasonable capacity and appearance. It should be private, quiet, and conducive to a dignified proceeding. Telephone calls or other interruptions should not be permitted. Normal locations for hearings are the area hearing office or the city in which the district office is located. The Hearing Officer has discretion to grant requests for hearings in other locations.
6. Attendance at In-Person Hearings. Subject to the availability of space, in-person hearings are open to the public. Coast Guard personnel are free to observe the proceedings and may be permitted to present rebuttal evidence at the close of the party's presentation. However, Coast Guard personnel attending the hearing shall not be given the opportunity to question or cross-examine the party or other witnesses. Hearings are not trials, and the Hearing Officer should avoid any action by the Coast Guard which might create such an appearance. The Hearing Officer has discretion to close the hearing if he or she determines a public hearing would interfere with the conduct of a fair and impartial proceeding. If it appears confidential information will be disclosed, the public may be excluded.

7. **Appearances.** The record for the hearing should include a list of the names and positions of the persons present, identification of whom they represent, their addresses and telephone numbers. The record should show a positive determination that, in the absence of the party, any person appearing for the party is a bona fide representative.
8. **Opening.** While the hearing should be informal, the Hearing Officer must maintain control. An appropriate opening statement should explain the role and responsibilities of the Hearing Officer, and the hearing and appeal procedures. The Hearing Officer's impartiality and independence should be emphasized. The rights of the party should be explained and the party specifically queried as to whether those rights are understood. The Hearing Officer should also review the government's evidence which has led him to believe that a prima facie case has been established.
9. **Party Access To The Record.** The case file shall be offered for the party's review. Any questions regarding the case file and the hearing procedures should be addressed early. Complaints as to sufficiency of notice (e.g., not providing copies of important documents from the file earlier) should be addressed at the outset. A brief recess or even a postponement may have to be considered.
10. **Party Presentation.** The party presents his or her case. This may be done in accordance with general procedures established and explained by the Hearing Officer. The party should be granted broad discretion in the manner in which his or her case is presented. The best manner for the Hearing Officer to receive this presentation is simply to listen, without interruption, while taking notes. The party's points with respect to the issues are most important here, though it can be useful to air certain preliminary arguments, e.g., jurisdiction, objections to proceedings or procedures, non-factual objections to evidence, etc. If the basic meaning or purpose of the material presented is not clear, the Hearing Officer should ask for clarification. Ascertaining details or additional information can wait until the completion of the party's presentation. The Hearing Officer should endeavor to draw out information from the party, whether that information is favorable to the party or not. The purpose of the hearing is to provide the party the opportunity to present evidence and arguments.

11. **Testimony.** Witnesses may present sworn or unsworn testimony. Most often, a witness only presents information from his or her perspective. There usually is no need to pass immediate judgment on the veracity of each person involved in offering evidence. The Hearing Officer may question witnesses. Such questioning should be limited to matters raised in the witness' testimony.
12. **Documentary Evidence.** No formalities associated with the submission of documentary evidence are required when documents are offered. Their submission should simply be noted on the record. It is rare that documents will have to be treated with special procedures. The Hearing Officer should analyze the submissions to ensure he understands what they are and what it is they are intended to show.
13. **Rebuttals.** Rebuttal evidence must either be presented in writing, or presented at an in-person hearing. To expedite matters, a reasonable time period within which to present any written rebuttal evidence should be specified by the Hearing Officer. The Hearing Officer should carefully review any rebuttal to ascertain whether new evidence is being submitted. The party shall be permitted to respond to any rebuttal evidence.
14. **Management Of Proceedings.** Participation by persons other than the party should be conscientiously controlled. Care should be taken to ensure that witnesses do not wander around issues or avoid questions. No one should be allowed to use the opportunity to testify as a forum to preach, or present evidence on irrelevant issues. Hearing Officers should not tolerate intimidation ploys by any hearing participant.
15. **Wrap-up.** The Hearing Officer's final question of the party should be whether there is anything else to be offered. Once this is ascertained, then the Hearing Officer should close the hearing.
16. **Continuations.** Any continuation provided for the submission of written information must be for a specified time. Additional extensions are generally discouraged, and the party should be so advised. A general rule is to always give the party enough time while not allowing unnecessary delay. The need for an additional in-person hearing session is rare.

B. Alternative Procedures.

1. General. While there is the right to an in-person hearing, there is no absolute right to hold that hearing in the exact location desired by the party. In civil penalty cases, use of the telephone should be limited to conveying procedural or informational matters to parties or to examining witnesses who are not reasonably available to appear at the hearing. The civil penalty case work load, budgetary constraints, or the location of a Hearing Officer or witnesses, may preclude conducting an in-person hearing at or nearer to a site preferred by the party. Alternative procedures which permit oral presentations and/or witnesses' testimony may be considered. However, certain basic criteria should be applied.
2. Telephone Hearings. For the convenience of the party, the Hearing Officer may conduct a hearing by telephone. Before such a hearing begins, the party should have waived his right to an in-person hearing in writing, so that no argument can be made later that the party was denied this opportunity. The hearing should commence, proceed, and end in a structured and predictable manner. Both the Hearing Officer and the party must be able to hear all testimony simultaneously, either by use of extension telephones or a speaker phone. The party's end of the telephone hearing may be monitored by a Coast Guard representative who can identify the persons present and accept physical or written materials offered.
3. Testimony Via Telephone. Hearing Officers may obtain testimony of witnesses who are otherwise not reasonably available. As noted above, both the Hearing Officer and the party must be able to hear the testimony simultaneously. The Hearing Officer may require the presence of a Coast Guard representative to verify identification of the witness.

## CHAPTER 5. DECISIONS

A. General. Hearing Officers issue their decisions in letter form to the party. The letter must clearly state the decision and findings.

1. Evidence. The evidence will sometimes be so obvious that the basis for the decision is quite clear, e.g., the party admits to the violation. When a penalty is assessed, the letter should explain what evidence was considered, what violations were found to have occurred, and the basis for the penalties. If a party indicates that an incorrect law or regulation was cited, and the Hearing Officer determines that, although the citation was incorrect, the party had adequate notice of the substance of the alleged violation, the Hearing Officer may find that the violation occurred as alleged and assess a penalty.

2. Arguments. Relevant arguments offered by the party must be explicitly addressed. When the party's arguments are clearly inappropriate, incorrect, or without merit, there is no need to provide an in depth discussion. The Hearing Officer should take care, though, not to casually dismiss an issue or argument out-of-hand. The record in a case must contain the information that supports the Hearing Officer's findings.

B. Dismissals. If a case is dismissed, the program manager may resubmit it unless the dismissal follows a rehearing. If a resubmitted case is deemed acceptable and reopened by the Hearing Officer, the proceedings must start from the beginning with the issuance of a LON.





## CHAPTER 6. APPEALS

### A. Action on Appeal.

1. Appeal of a Hearing Officer's decision must be submitted to the Hearing Officer, postmarked within 30 days of receipt of the decision. If the party's letter does not clearly state he is filing an appeal, the Hearing Officer must review the letter and determine whether it is more appropriate to forward it to the Commandant as an appeal or reopen the case. All letters indicating an intent to appeal, regardless of timeliness, must be processed in accordance with the following guidelines.
2. A copy of any appeal is given to the district commander. The district commander may submit comments on the appeal. All processing of the appeal, including forwarding of any comments received from the district commander, must be completed within 30 days of receipt of the appeal.
3. The entire original case file will be forwarded to Commandant (G-LMI). The Hearing Officer need not retain anything related to the case once it is forwarded to Commandant (G-LMI).
4. When the Commandant's action on appeal is completed, the case file is returned to the Hearing Officer. The Commandant may affirm, reverse, or modify the decision, or remand the case.

### B. Action On Remanded Cases.

1. Focus Of Attention. With a remanded case, the Hearing Officer must go back to the point in the proceedings identified by the Commandant. It is not necessary to go back further, but it may be done.
2. File Disposition During Review. The Hearing Officer should review the file in conjunction with the letter from the Commandant to determine what additional matters must be addressed.
  - a. If additional evidence is required, a copy of the portion of the file relevant to the remand may be returned to the program manager. If the program manager replies that additional evidence is not available or will not be provided (i.e., the case will not be pursued further), the party should be informed that the case has been dismissed and the case closed.
  - b. If the program manager offers new arguments but not evidence, or the overall weight of the evidence

remains deficient, the case must be dismissed and the party so informed.

3. Further Proceedings. If the Hearing Officer determines that the case warrants further consideration, he notifies the party, in writing, that the case is being reconsidered and:
  - a. Specifies the issues to be addressed;
  - b. Gives the party the opportunity to re-examine the case file, which now includes a copy of the Commandant's remand letter to the Hearing Officer and any additional evidence;
  - c. Gives the party 30 days from the date of receipt of this notice to reply before reconsidering the evidence and making a revised decision; and
  - d. Provides the party with copies of any additional evidence that was added to the file.
4. Additional Findings. The Hearing Officer may determine additional findings as appropriate in cases where, for example:
  - a. additional evidence has been submitted by either the program manager or the party;
  - b. the party's late submission is to be considered;
  - c. a different interpretation of law is to be applied;  
or
  - d. a subsidiary issue is explicitly resolved.
5. Appeal. A copy of the additional findings or decision is sent to the party with notification that the party may appeal the decision within 30 days.

## APPENDIX A

### TIMELINE FOR CIVIL PENALTY ADJUDICATION

<u>Event Time</u>	<u>Elapsed Time</u>	
15 days	15 days	Hearing Officer receives report from Program Manager; if prima facie case exists, opens case and generates Letter of Notification (LON).
45 days	60 days	LON issued; respondent submits written response or schedules hearing.
30 days	90 days	Written response received in lieu of hearing; Hearing Officer considers all evidence, makes decision, sends letter informing respondent of decision.

(NOTE: Because of the need to aggregate in-person hearings held external to the hearing office, the timeframe for holding hearings will vary.)

<u>Event Time</u>	<u>Elapsed Time</u> (after hearing)	
45 days	45 days	Respondent pays penalty, appeals decision, or fails to respond.
30 days	75 days	Hearing Officer receives appeal; Program Manager reviews case and provides comments; Hearing Officer forwards case to Commandant (G-LMI). In case of failure to respond, case forwarded for collection action.
60 days	135 days	Commandant processes appeal and renders decision.

